INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	6
Conclusion	8

CITATIONS

Cases:

Bilby v. *Malone*, 130 Okla. 217	7
Bowling v. *United States*, 233 U. S. 528	7
Goodin v. *Commissioners of the Land Office*, 174 Okla. 364	8
Goodrum v. *Buffalo*, 162 Fed. 817	8
Harris v. *Bell*, 254 U. S. 103	5
Heckman v. *United States*, 224 U. S. 413	7
MacGregor v. *State Mutual Life Assurance Co.*, 315 U. S. 280	8
Privett v. *United States*, 256 U. S. 201	7
State v. *Ward*, 189 Okla. 532	8
Stewart v. *Keyes*, 295 U. S. 403	5
Sunderland v. *United States*, 266 U. S. 226	7
Tidal Oil Co. v. *Flanagan*, 87 Okla. 231, writ of error dismissed, 263 U. S. 444	7

Statutes:

Oklahoma Statutes, 1941, Title 12, sec. 93 (1)	2
Act of May 27, 1908, c. 199, 35 Stat. 312, sec. 9	5
Act of April 12, 1926, c. 115, 44 Stat. 239, sec. 2	2

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 480

MRS. H. B. FUSTON AND STATE OF OKLAHOMA, ON RELATION OF THE COMMISSIONERS OF THE LAND OFFICE OF SAID STATE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's findings of fact and conclusions of law appear at R. 26–34. The opinion of the circuit court of appeals (R. 41–44) is reported in 143 F. 2d 76.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 22, 1944 (R. 45). A petition for rehearing was denied on June 19, 1944 (R. 46). The petition for a writ of certiorari was filed September 19, 1944. The jurisdiction of this

Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under Oklahoma law, the State and its instrumentality, both of which enjoy immunity from suit, are entitled to invoke a state statute of limitations to bar a suit to recover lands adverse possession of which was had by the State for the statutory period.

STATUTES INVOLVED

Oklahoma Statutes, 1941, Title 12, sec. 93 provides, in part, as follows:

> Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no time thereafter.
>
> 1. An action for the recovery of real property sold on execution, brought by the execution debtor, his heirs, or any person claiming under him, by title acquired after the date of the judgment, within five years after the date of the recording of the deed made in pursuance of the sale.

The pertinent part of Section 2 of the Act of April 12, 1926, c. 115, 44 Stat. 239, provides as follows:

> SEC. 2. The statutes of limitations of the State of Oklahoma are hereby made and declared to be applicable to and shall have full

> force and effect against all restricted Indians of the Five Civilized Tribes, and against the heirs or grantees of any such Indians, and against all rights and causes of action heretofore accrued or hereafter accruing to any such Indians or their heirs or grantees, to the same extent and effect and in the same manner as in the case of any other citizen of the State of Oklahoma, and may be pleaded in bar of any action brought by or on behalf of any such Indian, his or her heirs or grantees, either in his own behalf or by the Government of the United States, or by any other party for his or her benefit, to the same extent as though such action were brought by or on behalf of any other citizen of said State.

STATEMENT

This action was instituted in the United States District Court for the Eastern District of Oklahoma by the United States against the petitioner, Fuston, to recover possession of certain lands in Bryan County, Oklahoma, for the use and benefit of Sissie Pierce, a restricted full-blood Choctaw Indian.[1] Mrs. Fuston answered, claiming a right to possession based on a lease from the Commissioners of the Land Office of the State of Oklahoma (R. 7). The State, on relation of the Commissioners of its Land Office, after securing leave

[1] The complaint was later amended to show the death of Sissie Pierce and that the action was being prosecuted on behalf of her heirs (R. 12).

of court to do so, intervened and filed an answer and cross-complaint (R. 13). In its answer the State alleged that it was, and since December 24, 1932, had been, the owner "in the open, notorious, adverse, continuous, peaceable and lawful possession" of the land. It then prayed for judgment denying relief to the United States. In its cross-complaint, the State adopted the allegations of the answer and then alleged that it deraigned its title through a sheriff's deed duly recorded on December 30, 1932,

> and that more than five years has elapsed since the recording of said Sheriff's Deed as aforesaid, and your Intervenor hereby pleads and invokes the Statute of Limitations of the State of Oklahoma, the same being Title 12, Section 93, O. S. 1941, as a bar to any right, title, interest, equity and claim of the plaintiff herein * * *

(R. 14–15). A judgment quieting title in the State was then prayed. The United States filed a second amended complaint (R. 23) charging that a foreclosure judgment, upon which the sheriff's deed was based, was void, and that both the judgment and the sheriff's deed constituted clouds on the title of the Indian. It then prayed for a judgment quieting title to the land in it and the heirs of Sissie Pierce, and canceling the foreclosure judgment and the sheriff's deed.

The facts were stipulated in the district court (R. 19–23). The essential parts of the stipulation may be summarized as follows: Sissie Pierce

mortgaged her inherited restricted land to the State of Oklahoma but the mortgage was not approved by any county court or county judge of the State of Oklahoma [2] and the restrictions on the land were not removed; in 1931, suit was brought in the District Court of Bryan County, Oklahoma, by the State of Oklahoma and the Commissioners of the Land Office to foreclose that mortgage and in January, 1932, judgment of foreclosure was entered; a sale was ordered on August 31, 1932, and on October 4, 1932, the sheriff made a return showing the land sold to the State of Oklahoma; on December 23, 1932, the sale was confirmed by the court and a sheriff's deed delivered; the deed was recorded in the proper office on December 30, 1932.

The district court found the facts to be as stipulated and concluded as matters of law that the land was restricted in the hands of the Indian, that any conveyance by her required the approval of the County Court of Bryan County (Conclusion 5, R. 32), that the mortgage and judgment were void and that "unless the plaintiff is barred by the statute of limitations of the State of Oklahoma, judgment herein should be for the plaintiff" (Conclusion 6, R. 32). The court held that

[2] Approval by a county court is necessary to give validity to a conveyance of inherited restricted land by a member of the Five Civilized Tribes. Act of May 27, 1908, c. 199, sec. 9, 35 Stat. 312; *Stewart* v. *Keyes*, 295 U. S. 403; *Harris* v. *Bell*, 254 U. S. 103.

the statute of limitations barred the action and entered judgment denying relief to the United States and quieting title in the State (R. 34). On appeal, however, the circuit court of appeals held that the statute of limitations was not applicable (R. 44).

Although the parties had proceeded on the assumption that the lands were restricted, the Government called to the attention of the circuit court of appeals an order of the Secretary of the Interior removing restrictions from the lands of Sissie Pierce (R. 44). Since it was not clear whether the land here involved was affected by the order, and since the order had not been brought to the attention of the district court, the circuit court of appeals remanded the case to the district court for a determination as to whether the land was restricted on the date when it was mortgaged.

ARGUMENT

1. The only defense pleaded or urged by petitioners in either court below was the statute of limitations. *Res judicata* was not raised by petitioners in either court and neither court considered or decided whether the principle of *res judicata* was applicable. The question cannot be raised here for the first time. In any event, there is no substance to petitioners' contention that the state court decree in the foreclosure proceeding precludes this action by the United States to recover possession and

quiet title (Br. 10). The parties to the foreclosure proceeding which led to the judgment upon which petitioners rely here were the State and a restricted Indian of the Five Civilized Tribes. The United States was not a party to that suit and was, therefore, not bound by the judgment. *Privett* v. *United States,* 256 U. S. 201; *Sunderland* v. *United States,* 266 U. S. 226; *Bowling* v. *United States,* 233 U. S. 528; cf. *Heckman* v. *United States,* 224 U. S. 413.[3] The United States was free to impeach the foreclosure judgment for error of fact or law. *Privett* v. *United States,* 256 U. S. 201, 204. *A fortiori* it could attack that judgment on the ground of lack of jurisdiction over the subject matter of the proceeding. Contrary to the statement in petitioners' brief (p. 11), the Government attacked the judgment and the sheriff's deed on that very ground (Brief for the United States in the district court, p. 4, and in the C. C. A., p. 7). That contention was unopposed by petitioners. The district court sustained the contention and held that the foreclosure judgment was void. Its decision in that respect was entirely correct, was approved by the circuit court of appeals, and is squarely supported by both Oklahoma and federal decisions. *Bilby* v. *Malone,* 130 Okla.

[3] If notice of the pendency of the suit had been given to the Superintendent of the Five Civilized Tribes as authorized by section 3 of the Act of April 12, 1926 (chapter 115, 44 Stat. 239), the United States would, of course, have been bound. The notice, however, was not given.

217; *Tidal Oil Co.* v. *Flanagan,* 87 Okla. 231, writ of error dismissed, 263 U. S. 444; *Goodrum* v. *Buffalo,* 162 Fed. 817 (C. C. A. 8).

2. The only question decided by the circuit court of appeals was whether under Oklahoma law the State could take advantage of its own statute of limitations when it had not consented to be sued. The court held against the State and rested its decision on rulings of the Supreme Court of Oklahoma. ~~Cf.~~ *Goodin* v. *Commissioners of the Land Office,* 174 Okla. 364; *State* v. *Ward,* 189 Okla. 532. Those rulings support the decision of the circuit court of appeals, and, in the absence of a conflict with State court decisions this court should not be called upon to substitute its judgment for that of the court below. Cf. *MacGregor* v. *State Mutual Life Insurance Co.,* 315 U. S. 280. Since the sole question presented is one of Oklahoma law, only the Supreme Court of that State can render a decision of binding authority in all courts. A decision by this Court would settle the question only for purposes of this case. In addition, the circuit court of appeals remanded the case to the district court, and since petitioners may yet be successful on that remand, review of a question of this sort by this Court now might well be fruitless.

CONCLUSION

The decision below presents only a question of state law. There is no conflict with decisions of the courts of the State. The decision is not of public

importance or of general application within or without the State of Oklahoma. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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